STATE OF MICHIGAN

COURT OF APPEALS

MILJEVICH CORPORATION, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED August 16, 2007
v	No. 268356 Ontonagon Circuit Court
NORTH COUNTRY BANK & TRUST, Defendant-Appellant/Cross-Appellee.	LC No. 04-000094-CK

Before: Whitbeck, C.J., and Talbot and Zahra, JJ.

PER CURIAM.

In this breach of contract action, defendant appeals as of right, and plaintiff cross-appeals as of right, a judgment entered in favor of plaintiff following a bench trial. We reverse and remand for entry of a judgment of no cause of action in favor of defendant.

On December 21, 1998, Eli Miljevich, the president of plaintiff Miljevich Corporation, executed a $1,464,650 business loan agreement with defendant North Country Bank and Trust. The loan note provided that the interest rate on the loan was "[o]ne and one-half percent (1 1/2%) per annum above the 'prime' rate as published from time-to-time by the Bank as its 'prime rate.'" Eli died in October 1999. His wife, Kathleen Miljevich, became plaintiff's president. In December 1999, Kathleen met with the bank officer who negotiated the terms of the loan with Eli, in part, in an effort to obtain a lower interest rate on the loan to reduce the monthly payments. At that time, Kathleen did not know what the interest rate was on the loan. At the meeting, the bank officer did not tell Kathleen what the interest rate was. Following the meeting, defendant's employees repeatedly failed to respond to Kathleen's inquiries regarding the applicable interest rate. In September 2003, plaintiff refinanced the loan and paid, in full, the amount owing to defendant. Thereafter, plaintiff initiated this action against defendant, alleging that defendant breached the terms of the loan agreement by failing to publish its internal prime rate ("NCB prime"), failing to inform plaintiff about what NCB prime was, and by overcharging interest on the loan.

Following a bench trial, the trial court found that the parties' agreement was unambiguous, yet incomplete. The court reasoned that, because defendant failed to publish NCB prime, as provided in the note, defendant could not apply NCB prime to the loan. The parties' agreement did not mention any other interest rate. Thus, the trial court applied what it determined to be a "reasonable" interest rate to the loan: Wall Street Journal prime ("WSJ

prime") plus 1 1/2 percent. WSJ prime was lower than NCB prime. The trial court awarded a judgment to plaintiff in the amount of $140,326.78, which included $113,567.22 in damages for the overpayment of interest, $6,291.56 in judgment interest, $380 in costs, and $20,088 in case evaluation sanctions pursuant to MCR 2.403. This appeal followed.

Plaintiff and defendant contend that the trial court erred in applying an interest rate of WSJ prime plus 1 1/2 percent to the loan. Defendant contends, on appeal, that the trial court should have applied an interest rate of NCB prime plus 1 1/2 percent to the loan, as provided in the loan note. Plaintiff contends, on cross-appeal, that the trial court should have applied an interest rate of 1 1/2 percent to the loan.

Following a bench trial, we review a trial court's factual findings for clear error and its conclusions of law de novo. *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 531; 695 NW2d 508 (2004). A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire record is left with a definite and firm conviction that a mistake has been made. *Id.* "Moreover, questions involving the proper interpretation of a contract or the legal effect of a contractual clause are also reviewed de novo." *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005).

"The primary goal in the construction or interpretation of any contract is to honor the intent of the parties." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 473; 663 NW2d 447 (2003) (citation omitted). "To do so, this Court reads the agreement as a whole and attempts to apply the plain language of the contract itself." *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000). "[C]ourts must give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Klapp, supra* at 468. "An unambiguous contract must be enforced according to its terms." *DaimlerChrysler Corp v G-Tech Professional Staffing, Inc*, 260 Mich App 183, 185; 678 NW2d 647 (2003).

Defendant concedes that it did not publish the NCB prime rate, as provided in the note. Trial testimony established that information regarding NCB prime was not disseminated to the public in the newspaper, on television, or on the radio. NCB prime was not documented on a placard in defendant's branch offices. Defendant's customers did not have access to the computer system where the changes in NCB prime were logged. The only way for a customer to learn of the NCB prime rate was to go to the bank and speak to a lender. Defendant's failure to publish NCB prime constituted a breach of the parties' agreement. When performance of a contractual obligation is due, . . . "anything short of full performance is a breach, even if the party who does not fully perform was not at fault and even if the defect in his performance was not substantial." *Woody v Tamer*, 158 Mich App 764, 772; 405 NW2d 213 (1987), quoting Restatement Contracts, 2d, § 235, Comment b, p 212.

Nevertheless, defendant's breach did not preclude defendant from charging interest on the loan at the rate of NCB prime plus 1 1/2 percent. Based on the plain language of the parties' contract, we are satisfied that the parties intended that the applicable interest rate would be NCB prime plus 1 1/2 percent. Neither the term loan agreement nor the loan note mentions any interest rate other than NCB prime plus 1 1/2 percent. Nothing in the parties' agreement suggests that the parties intended any other interest rate to apply to the loan, even in the event that defendant failed to publish the NCB prime rate. "Too much regard is not to be had to the

proper and exact signification of words and sentences, so as to prevent the simple intention of the parties from taking effect." *Hustina v Grand Trunk Western R Co*, 303 Mich 581, 586-587; 6 NW2d 902 (1942). See also *Stark v Budwarker, Inc*, 25 Mich App 305, 314; 181 NW2d 298 (1970).

Thus, the trial court erred in applying an interest rate of WSJ prime plus 1 1/2 percent to the loan. Under some circumstances where a contract is incomplete, "the law supplies the missing details by construction." *Muci v State Farm Mut Automobile Ins Co*, 267 Mich App 431, 440-441; 705 NW2d 151 (2005) (citation omitted). However, contrary to the trial court's finding, the parties' agreement was not incomplete. The agreement provided the applicable interest rate. Moreover, "courts will presume reasonable terms *unless the parties express a contrary intention*." *Kojaian v Ernst*, 177 Mich App 727, 731; 442 NW2d 286 (1989) (emphasis added). The note in this case expressly provided that the interest rate was NCB prime plus 1 1/2 percent. Thus, there was no basis for the trial court to apply what it determined to be a "reasonable" interest rate to the loan. "When a court abrogates unambiguous contractual provisions based on its own independent assessment of 'reasonableness,' the court undermines the parties' freedom of contract." *Rory, supra* at 468-469.

> [U]nless a contract provision violates law or one of the traditional defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written. We reiterate that the judiciary is without authority to modify unambiguous contracts or rebalance the contractual equities struck by the contracting parties because fundamental principles of contract law preclude such subjective post hoc judicial determinations of "reasonableness" as a basis upon which courts may refuse to enforce unambiguous contractual provisions. [*Id.* at 461.]

In refusing to apply NCB prime plus 1 1/2 percent to the loan, the trial court failed to apply the plain language of the contract itself and, thereby, failed to honor the intent of the parties. *Id.* at 468; *DaimlerChrysler Corp, supra* at 185.

We reject plaintiff's contention that, because defendant failed to publish the NCB prime rate, the only interest rate that defendant could have applied to the loan was 1 1/2 percent. We agree with the trial court that defendant's failure to publish the NCB prime rate was not the same as defendant publishing a prime rate of zero percent, which would have resulted in an interest rate of 1 1/2 percent under the terms of the note. Further, applying an interest rate of 1 1/2 percent to the loan would not only be contrary to the parties' intent, as expressed in the plain language of their agreement, but would, in effect, punish defendant for breaching the contract. "[T]he goal in contract law is not to punish the breaching party, but to make the nonbreaching party whole." *Corl v Huron Castings, Inc*, 450 Mich 620, 625-626; 544 NW2d 278 (1996).

Defendant next contends that plaintiff failed to prove that it suffered any damages as a result of defendant's breach of the agreement. Therefore, the trial court erred in awarding plaintiff a money judgment.

"In an action based on contract, the parties are entitled to the benefit of the bargain as set forth in the agreement." *Ferguson v Pioneer State Mut Ins Co*, 273 Mich App 47, 54; 731 NW2d 94 (2006). "The remedy for breach of contract is to place the nonbreaching party in as

good a position as if the contract had been fully performed." *Corl, supra* at 625. "[T]he damages recoverable for breach of contract are those that arise naturally from the breach or those that were in the contemplation of the parties at the time the contract was made." *Kewin v Massachusetts Mut Life Ins Co*, 409 Mich 401, 414; 295 NW2d 50 (1980). "The party asserting a breach of contract has the burden of proving its damages with reasonable certainty, and may recover only those damages that are the direct, natural, and proximate result of the breach." *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003).

Plaintiff alleges that it suffered damages because it "was overcharged interest." However, the evidence does not support plaintiff's assertion. Plaintiff's own expert witness testified that the interest that plaintiff paid on the loan was consistent with NCB prime plus 1 1/2 percent, the interest rate that the parties intended to apply to the loan. Nothing in the record indicates that defendant charged plaintiff an interest rate higher than NCB prime plus 1 1/2 percent during the loan repayment period. Because plaintiff negotiated an interest rate of NCB prime plus 1 1/2 percent, and paid an interest rate of NCB prime plus 1 1/2 percent, plaintiff received the benefit of the bargain as set forth in the parties' agreement. *Ferguson, supra* at 54. In other words, plaintiff was not entitled to any damages because defendant's breach of the contract was, as to plaintiff, *damnum absque injuria*, or "damage without injury." *Michigan Dep't of Transportation v Tomkins*, 270 Mich App 153, 161; 715 NW2d 363 (2006). Had defendant published the NCB prime rate "from time-to-time," as provided in the note, the actual interest rate that plaintiff paid on the loan would not have changed. Defendant's act of publishing the NCB prime rate would not have changed the manner in which the interest was calculated on the loan, and would not have changed any of the terms of the loan. Thus, the trial court erred in determining that plaintiff suffered any measurable damages as a result of defendant's breach of the agreement. See *Crawford v Cicotte*, 186 Mich 269; 152 NW 1065 (1915).

Plaintiff asserts that, "had the Defendant published it's internal prime rate, the Plaintiff very well would have refinanced it's [sic] loan sooner than it did." However, plaintiff failed to present any evidence to support this assertion. These alleged damages are purely speculative in nature. "A plaintiff asserting a cause of action has the burden of proving damages with reasonable certainty, and damages predicated on speculation and conjecture are not recoverable." *Health Call of Detroit v Atrium Home & Health Care Services, Inc*, 268 Mich App 83, 96; 706 NW2d 843 (2005). "[D]amages which are purely speculative in character, and dependent on so many contingencies that they cannot be traced with reasonable certainty to the breach of the contract, are not allowable." *Valley Die Cast Corp v A C W Inc*, 25 Mich App 321, 338-339; 181 NW2d 303 (1970) (citation omitted). Thus, plaintiff failed to establish that it suffered any damages as a result of defendant's breach.

Plaintiff contends, on cross-appeal, that the interest it paid on the loan was unlawful and, thus, it is entitled to return of all of the interest that it paid to defendant. Plaintiff's argument is based on the following provision in the note:

> In no event shall the interest rate exceed the maximum rate allowed by law; any interest payment which would for any reason be deemed unlawful under applicable law shall be applied to principal.

Plaintiff's argument is without merit. This provision was drafted to address a circumstance where a contract or note charges a usurious interest rate. A contract or promissory note charges a usurious interest rate where it charges interest at a rate that exceeds the interest allowed under the applicable law. See *Washburn v Michailoff*, 240 Mich App 669, 674; 613 NW2d 405 (2000). "[W]hen a lender seeks to enforce a usurious contract, the borrower is entitled to have any previously paid interest applied against the outstanding principal." *Id.* at 674. The note in this case did not charge a usurious interest rate; the interest rate did not exceed the maximum rate allowed by law. See MCL 438.61; MCL 450.1275. Thus, there was no basis for plaintiff to assert that the interest rate that it agreed to pay was unlawful. Plaintiff was bound to pay the interest rate promised in writing and cannot raise the defense of usury to argue that the interest should have been applied to principal and, therefore, it is entitled to a return of all of the interest. See *Kleanthous v First of Chelsea Corp*, 201 Mich App 440, 441-442; 507 NW2d 2 (1993). Thus, plaintiff failed to establish that it was entitled to any relief on its breach of contract claim.

We reverse the judgment entered in favor of plaintiff and remand this matter to the trial court for entry of a judgment of no cause of action in favor of defendant. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Michael J. Talbot
/s/ Brian K. Zahra